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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 312

JEWEL RAMSEY CROUCH, ADMINISTRATRIX OF THE ESTATE OF MALCOLM LEE CROUCH, DECEASED,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

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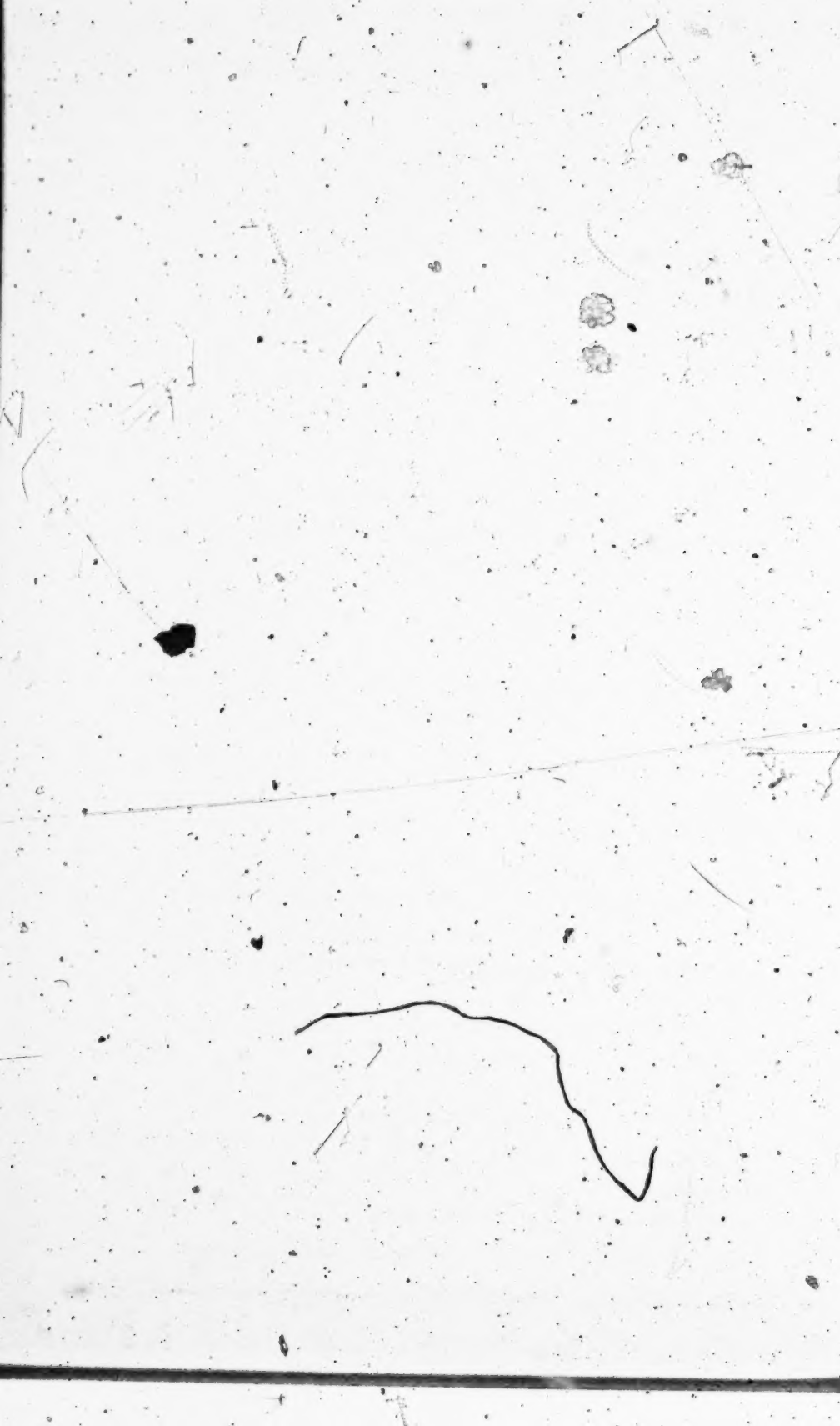

INDEX

Opinions Below 2
Jurisdiction 2
Question Presented 3
Constitutional Provisions and Statutes Involved 3
Statement 4
Reasons for Granting the Writ 8
Conclusion 11

CITATIONS OF AUTHORITY

CASES:

Bowman v. Virginia State Entomologists, 105 S.E. 141, 128 Va. 351 10
Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 677-78 2
Buckeye Cotton Oil Co. v. Campagna, 242 S.W. 646 (Tenn., 1922) 10
Chesapeake R. Co. v. Ware, 122 Va. 246, 95 S.E. 183 10
Chinkscales v. Mundkoski, 79 P.2d 562 (Oklahoma, 1938) 10
C & O R.R. Co. v. DeAtlay, 241 U.S. 310 9
Cole v. Arkansas, 333 U.S. 196, 200 2
Dini v. Naiditch, 170 N.E.2d 881 (Ill., 1960) 10
Great Northern R. Co. v. Sunburst Oil Co., 287 U.S. 358, 366-67 2
Levy v. Louisiana, etc., et al., No. 508, Oct. 1967 Term, Decided May 20, 1968 11
Liming v. Illinois Central Ry. Co., 47 N.W. 66, 68 (Iowa, 1890) 9
McGovern v. Phila. & R. R. Co., 235 U.S. 389 9
Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 2
Ohio ex rel. Bryant v. Akron Park District, 281 U.S. 74, 79 2

Saunders v. Shaw, 244 U.S. 317, 320 2
Schmertz v. Hargen, 171 A.2d 89, 91 (Conn. 1961) 9
Seaboard Air Line R. Co. v. Koennecke, 239 U.S. 352 9
Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 9
Shenker v. B & O R. Co., 374 U.S. 1 10
Zuercher v. Northern Jobbing Co., 66 N.W.2d 892 (Minn., 1943) 10

CONSTITUTIONAL PROVISIONS:

Fourteenth Amendment to the Constitution of the United States 2, 3, 9, 11
Constitution of Virginia, Section 11 10

STATUTES:

Code of Virginia, Title 10, Section 10-59 . . . . . 3, 9
Code of Virginia, Title 56, Section 56-428 . . . . . 4, 7, 10
Code of Virginia, Title 65, Section 65-62 9

TREATISES:

42 A.L.R.2d 494 9
Restatement of Law of Torts, Negligence, Vol. II, p. 1241 . . . 9

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Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Petitioner, Jewel Ramsey Crouch, widow and administratrix of the estate of Malcolm Lee Crouch, deceased, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia at Richmond, entered in this cause on March 4, 1968, and on April 22, 1968.

OPINIONS BELOW

The Jury Verdict in the Supreme Court of Amherst, Virginia, appears in the Record on pages 131-32. The Opinion of the Supreme Court of Appeals of Virginia at Richmond (App. A *infra*) is not reported. The denial of the Petitioner to a rehearing (App. C *infra*) is not reported.

JURISDICTION

The verdict of the jury in the Circuit Court of Amherst County, Virginia appears in the Record on pages 131-32. The opinion and judgment of the Supreme Court of Appeals of Virginia at Richmond (Appendix A, *infra* p. 12; R. 185-201) was entered on March 4, 1968, reversing the jury verdict and judgment of the trial court and entering judgment in favor of defendant. A Petition for Rehearing was timely filed by appellee (plaintiff below, petitioner herein), who asserted that she was denied the equal protection of the law and deprivation of property without due process of law (Appendix B, *infra* p. 22; R. 206, 207).[1] The Petition to Rehear was denied on April 22, 1968 (Appendix C, *infra* p. 24; R. 239). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).[2]

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[1]The opinion below was unexpected, and petitioner, who was appellee below, was unable to raise the constitutional issue until the Petition for Rehearing was filed. The issue of equal protection and due process has been preserved. See *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78.

[2]Merely because the denial of the petition to rehear does not refer to the constitutional question, the jurisdiction of the Supreme Court of the United States should not be denied. *Great Northern R. Co. v. Sunburst Oil Co.*, 287 U.S. 358, 366-67; *Ohio ex rel. Bryant v. Akron Park District*, 281 U.S. 74, 79; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320; *Saunders v. Shaw*, 244 U.S. 317, 320; *Cole v. Arkansas*, 333 U.S. 196, 200.

QUESTION PRESENTED

A volunteer fireman who was gainfully employed as a supervisor in a foundry was burned to death while fighting a fire to which he had been summoned under the threat of criminal sanctions for failing to respond. His estate brought suit in a state court for wrongful death caused by negligence. A jury verdict was returned in favor of his estate, but was vacated and reversed on appeal, notwithstanding an admission of negligence, on the part of the defendant. The *question presented* is whether state appellate courts can hold, as a matter of law, consistent with the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, that volunteer firemen voluntarily assume the risk of being burned to death, thereby depriving their estates from asserting rights and remedies as laymen who can recover in tort against those negligently causing injury and death, and further depriving their estates of the benefits professional firemen are entitled to under workmen's compensation laws?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. * * * No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Code of Virginia, Title 10, Section 10-59, provides in pertinent part:

> "Any forest warden to whom written instructions have been issued * * * shall have the authority to summon as many able-bodied male persons between eighteen and fifty years of age as may, in his discretion, be reasonably necessary to assist in extinguishing any forest fire. * * *

> "Any person so summoned who shall fail or refuse to assist in fighting such fire, unless such failure is due to physical inability or other good and valid reason, shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than twenty-five dollars."

The Code of Virginia, Title 56, Section 56-428, provides in pertinent part:

> "Whenever any person shall sustain damage from fire occasioned by sparks or coals dropped or thrown from the engine or train of any railroad company, such company shall be liable for the damage so sustained, whether such fire shall have originated on the company's right of way or not. * * *"

STATEMENT

Petitioner, hereinafter sometimes referred to as "plaintiff" or "appellee" below, partially adopts and quotes from the opinion below (Appendix A, *infra* p. 12) insofar as a statement of the evidence is concerned. This is done to simplify the factual questions and to avoid as much controversy as possible. However, fairness dictates that reference to the record by footnotes be made where warranted:

> "Jewel Ramsey Crouch, administratrix of the estate of Malcolm Lee Crouch, deceased[3] filed a motion for judgment against Chesapeake and Ohio Railway Company, the defendant, seeking to recover damages for the allegedly wrongful death of Malcolm Lee Crouch. The motion for judgment alleged that the defendant had negligently caused to be started on its right-of-way a fire which spread to adjoining property and that when the deceased, 'in response to request from Forest Warden,' attempted to extinguish the fire, he was severely burned, resulting in his death.

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[3]She was also his widow (R. 97).

"The defendant filed grounds of defense denying negligence on its part and asserting contributory negligence and assumption of risk on the part of the deceased.

"A jury trial resulted in a verdict in favor of the plaintiff in the sum of $35,000.00. The verdict was approved by the trial court in its final order, and the defendant was granted a writ of error.

"The tragic accident which was the source of this litigation occurred on April 18, 1964. In the early afternoon of that day, sparks from one of the defendant's trains started a fire in the dry grass and weeds on the right-of-way near Joshua Falls on the James River in Amherst County. The fire soon spread to woodland on the adjoining land of E. R. Stegor and report thereof was made to the local fire warden, Esmond Brightwell.

"Brightwell, before going to the fire himself, sent his nephew to the nearby residence of the deceased to 'call' the latter to 'come and help' control the fire. The deceased was not at home at the time; but when he returned, his wife told him that Brightwell wanted him to help fight the fire.

"The deceased, who was a member of the local volunteer fire department[4] and experienced in fighting forest fires, went to the scene of the fire. He

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[4]Deceased was regularly employed as a foreman in the shipping department at Glamorgan, and earned over $10,000 per year (R. 100). He was a member of the volunteer fire department in his community, not a full time, or even a part time professional fireman (R. 98):

"Q. Do you all have certain people you call to fight a fire?

A. You get anybody you can get. I think it is from eighteen to sixty-five and they are supposed to go if you ask them to go.

Q. They get paid what?

A. Six-five cents per hour. That is what is now.

Q. They were getting paid what then?

A. I think it was fifty cents then. It just went up recently." (R. 72)

spoke to Brightwell, who was engaged with several other men in raking a line to prevent the spread of the fire. He then went farther into the woods where he joined John McFaden, a fire warden, and Lloyd Evans, who had been 'requested'[5] by McFaden to help put out the fire.

"McFaden, Evans, and the deceased were raking in a draw or hollow at the foot of a mountain when 'wind got in' the fire and it 'just blew up' on them and became 'extremely hot.'

"The deceased suggested that he and his companions lie down in 'a bare spot a few feet' away and 'let the fire go over top' of them. McFaden, however, said, 'No . . . let's get out of here.'

"The three men started to 'run . . . . out of there.' Brightwell, meanwhile, in fighting the fire, had proceeded up the same draw or hollow where McFaden, Evans, and the deceased had been working. Brightwell saw the deceased come out of the wood 'hollering for help and running.' When Brightwell went to the deceased, he saw that he was badly burned.

"McFaden and Evans escaped the fire by going up the side of the mountain, over a ridge, and down the opposite side. When they had reached safety and were resting from their ordeal, they heard Brightwell 'holler'; and when they 'went down to where he was at,' they saw the deceased 'sitting on the bank' of a creek in a severely burned condition. The deceased told McFaden that 'he fell.'

"The deceased was taken to a hospital in Lynchburg and later was transferred to a hospital in Richmond where he died on June 4, 1964." (R. 185-188)

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[5]The opinion stresses the use of the word "request," which is an unfortunate choice:

"Q. Let me ask you one thing. As I understand from what you say, you have power and a position and you can call a man and he has got to come or he will be subject to a fine. Is that right?

A. That is right." (R. 78)

At the close of plaintiff's case, defendant moved for a verdict in favor of the defendant, urging that the deceased had voluntarily assumed the risk as a matter of law. While denying this motion and holding that it was a factual question for the jury, the trial judge stated as follows:

> "Mr. Sackett: Assumption of risk.
>
> "The Court: That is the thing that perplexes me because this man, while you have done a magnificent job of making this a voluntary service, it isn't voluntary really. It is the same as if the sheriff attempted to deputize people to suppress a riot or something. Suppose a person was killed or injured in the riot, the person who started the riot probably couldn't foresee it but certainly would be liable for the man's damages if he were killed or injured in the performances of his duty, and this was a duty, *not a voluntary service. The law says these people can be prosecuted if they refuse.* It is voluntary in the sense the man didn't resist doing the service but I think I will have to let it go on and make the whole record." (R. 103) (Emphasis supplied)

At the close of all evidence, the jury was fully instructed on all common law issues of negligence, and the defenses thereto, including "that if you believe from the evidence in this case that the hazard or risk resulting in the burns sustained by plaintiff's decedent was one which was known to the plaintiff's decedent and which he voluntarily assumed when he undertook to fight the fire here in question, then the plaintiff is not entitled to recover of the defendant and the jury should find for the defendant." (R. 130)

The jury returned a verdict for the plaintiff in the amount of $35,000 (R. 131, 132).

On appeal, the defendant *conceded that its negligence started the fire which caused decedent's death*[6] (Appendix A, *infra* p. 14; R. 188), but urged, *inter alia*, that "the de-

[6]This alone makes defendant liable as a matter of law. Virginia Code § 56-428. Unfortunately, it was not conceded at trial.

ceased, as a matter of law, assumed the risk of the hazards of the fire." *Ibid.* The Supreme Court of Appeals of Virginia felt that "the crucial determination made is whether the defendant is correct in its contention that the deceased, as a matter of law assumed the risk of the hazards of the fire . . ." (*Id.* p. 14; R. 189)

The Supreme Court of Appeals of Virginia held that deceased was in the same status as a full-time, professional fireman[7] who voluntarily assumed the risk of being burned to death, as a matter of law, and reversed the jury verdict and judgment of the trial court, entering final judgment in favor of defendant. (*Id.* p. 21; R. 199)

The constitutional questions of denial of due process and equal protection were raised in the petition for rehearing by the plaintiff (Appendix B, *infra* p. 22; see Jurisdiction, *supra*[8]), but said petition was denied (Appendix C, *infra* p. 24).

REASONS FOR GRANTING THE WRIT

1. The opinion below, which holds that decedent assumed the risk of being burned to death as a matter of law, com-

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[7]This is an incredible distortion of the evidence.

"Q. Do you know in this fire whom they would normally be using? Would it be people like Crouch and Evans and others that you would normally ask to come in, and Carson?

A. Well, we usually try to get anybody locally that was willing to help us." (R. 86-87)

* * *

"Q. But in this instance Malcolm Lee Crouch had some training. He was an experienced fire fighter was he not?

A. Not an expert fire fighter." (R. 88)

* * *

"Q. Did Mr. Crouch have any position with the Forestry Service?

A. No." (R. 68)

[8]". . . the practical result of the decision is to deprive the decedent of the equal protection of the law and of property without due process of law."

pletely deprives decedent of his rights and remedies under the Fourteenth Amendment to the Constitution of the United States, and creates a third class of individuals who are unable to assert their rights. The opinion places decedent in the same position as a paid, professional fireman. If he had been in that position, his widow and children would have been entitled to workmen's compensation benefits. Code of Virginia, Title 65, Sec. 65-62. Since he was not in this position, he received absolutely nothing under the workmen's compensation statute. If he had been treated as a layman, his estate would have been entitled to retain the jury verdict in the negligence action brought by them, since the "rescue doctrine" would have been applicable. 42 A.L.R.2d 494; *Schmertz v. Hargen*, 171 A.2d 89, 91 (Conn., 1961); Restatement of Law of Torts, *Negligence*, Vol. II, p. 1241; *Liming v. Illinois Central Ry. Co.*, 47 N.W. 66, 68 (Iowa, 1890). The opinion below, however, has the effect of preventing decedent from asserting his rights under either category, just because he was summoned, called or requested, to fight a fire in his community, under the compulsion of criminal sanctions for failing to respond. Code of Virginia, Title 10, Sec. 10-59.

2. The opinion below has so far departed from the accepted and usual course of judicial proceedings, that this Court ought to exercise supervision. Whether decedent voluntarily "assumed the risk" was a jury question, a question of fact, which was submitted to the jury. The Supreme Court of Appeals of Virginia, however, placed a different interpretation and finding on the evidence, and reversed the jury determination. Assumption of risk is always a question for the jury when the evidence is in conflict or when the inferences deducible from uncontroverted evidence are subject to different interpretations. *C & O R.R. Co. v. DeAtlay*, 241 U.S. 310; *McGovern v. Philadelphia & R. R. Co.*, 235 U.S. 389. Certainly the court below should not have searched the record for evidence upon which to take the case from the jury. *Seaboard Air Line R. Co. v. Koennecke*, 239 U.S. 352; *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S.

107. Moreover, in Virginia, the State Constitution, Sec. 11, guarantees a trial by jury in civil cases to the same extent as the Seventh Amendment to the Constitution of the United States. *Bowman v. Virginia State Entomologists*, 128 Va. 351, 105 S.E. 141.

3. The opinion below is so arbitrary, capricious, grossly unfair, and at odds with the law of other jurisdictions which have examined the specific question involving "volunteer" firemen who receive nominal or no compensation (decedent was paid 50 cents per hour while fighting fires although he earned over 10,000 dollars per year at his job), that this Honorable Court should grant the Writ. A fireman who is employed by private persons or who responds to such a call as a *volunteer* has been held to be an invitee or business visitor to whom the landowner owed a duty of reasonable care to keep the premises safe. *Chinkscales v. Mundkoski*, 79 P.2d 562 (Oklahoma, 1938); *Zuercher v. Northern Jobbing Co.*, 66 N.W.2d 892 (Minn., 1943); *Buckeye Cotton Oil Co. v. Campagna*, 242 S.W. 646 (Tenn., 1922); *Dini v. Naiditch*, 170 N.E.2d 881 (Ill., 1960). Ironically, if decedent had been employed by the defendant railroad to fight the fire, he would not have assumed the risk, as a matter of law. *Shenker v. B & O R. Co.*, 374 U.S. 1.

The defendant below, at trial, did not concede that its negligence caused the fire. However, defendant did concede this after the jury found that it had negligently caused the fire. (Appendix A, *infra* p. 14; R. 188). This maneuver by the defendant confined the jury trial to common law issues of negligence. If the admission had been made at trial, Virginia Code, Title 56, Sec. 56-428 would have applied, and plaintiff would have been entitled to a jury instruction on statutory negligence. *Chesapeake R. Co. v. Ware*, 122 Va. 246, 95 S.E. 183.

Whether a reviewing court may, under the circumstances of this case, deprive an active, community-conscious member of a rural community, of his common law, statutory and constitutional remedies and rights, is as important a

question as the one raised in *Levy v. Louisiana, etc., et al.*, decided by this Court on May 20, 1968, No. 508, October Term, 1967, where this Court unanimously reversed, saying as follows:

> "In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications * * * However that might be, we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side."

The way in which the opinion below, in a case of first impression, strains to classify decedent as a professional fireman is just as repugnant to the Equal Protection Clause, this Court, and any fair-thinking individual as the warped motives of the Louisiana legislature in the *Levy* case.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Brief

APPENDIX A

Present: All the Justices

CHESAPEAKE AND OHIO
RAILWAY COMPANY

OPINION BY JUSTICE
HARRY L. CARRICO

–v– Record No. 6541

Richmond, Virginia, March 4, 1968

JEWEL RAMSEY CROUCH,
Administratrix, etc.

FROM THE CIRCUIT COURT OF AMHERST COUNTY
C. G. Quesenbery, Judge

Jewel Ramsey Crouch, administratrix of the estate of Malcolm Lee Crouch, deceased, filed a motion for judgment against Chesapeake and Ohio Railway Company, the defendant, seeking to recover damages for the allegedly wrongful death of Malcolm Lee Crouch. The motion for judgment alleged that the defendant had negligently caused to be started on its right-of-way a fire which spread to adjoining property and that when the deceased, "in response to request from Forest Warden," attempted to extinguish the fire, he was severely burned, resulting in his death.

The defendant filed grounds of defense denying negligence on its part and asserting contributory negligence and assumption of risk on the part of the deceased.

A jury trial resulted in a verdict in favor of the plaintiff in the sum of $35,000.00. The verdict was approved by the trial court in its final order, and the defendant was granted a writ of error.

The tragic accident which was the source of this litigation occurred on April 18, 1964. In the early afternoon of that day, sparks from one of the defendant's trains started a fire in the dry grass and weeds on the right-of-way near Joshua Falls on the James River in Amherst County. The fire soon spread to woodland on the adjoining land of E. R. Steger

and report thereof was made to the local fire warden, Esmond Brightwell.

Brightwell, before going to the fire himself, sent his nephew to the nearby residence of the deceased to "call" the latter to "come and help" control the fire. The deceased was not at home at the time; but when he returned, his wife told him that Brightwell wanted him to help fight the fire.

The deceased, who was a member of the local volunteer fire department and experienced in fighting forest fires, went to the scene of the fire. He spoke to Brightwell, who was engaged with several other men in raking a line to prevent the spread of the fire. He then went farther into the woods where he joined John McFaden, a fire warden, and Lloyd Evans, who had been "requested" by McFaden to help put out the fire.

McFaden, Evans, and the deceased were raking in a draw or hollow at the foot of a mountain when "wind got in" the fire and it "just blew up" on them and became "extremely hot."

The deceased suggested that he and his companions lie down in "a bare spot a few feet" away and "let the fire go over top" of them. McFaden, however, said, "No . . . let's get out of here."

The three men started to "run . . . out of there." Brightwell, meanwhile, in fighting the fire, had proceeded up the same draw or hollow where McFaden, Evans, and the deceased had been working. Brightwell saw the deceased come out of the woods "hollering for help and running." When Brightwell went to the deceased, he saw that he was badly burned.

McFaden and Evans escaped the fire by going up the side of the mountain, over a ridge, and down the opposite side. When they had reached safety and were resting from their ordeal, they heard Brightwell "holler"; and when they "went down to where he was at," they saw the deceased

"sitting on the bank" of a creek in a severely burned condition. The deceased told McFaden that "he fell."

The deceased was taken to a hospital in Lynchburg and later was transferred to a hospital in Richmond where he died on June 4, 1964.

The case was tried in the court below upon common law principles. The jury was instructed, without objection, that for the plaintiff to recover, she was required to establish that the fire resulted from the defendant's negligence and that such negligence was the proximate cause of the death of the deceased. We do not consider, therefore, the possible application to the situation before us of Code, § 56-428, relating to the liability upon railroad companies for damages caused by fires started by engines or trains of such companies.

The assignments of error raise numerous issues; and in its brief, the defendant argues fully the four principal questions which it asserts are presented by this appeal, namely: whether it was negligent *quoad* the deceased; whether its negligence in starting the fire, which it now concedes, was the proximate cause of the death of the deceased; whether the deceased, as a matter of law, was guilty of contributory negligence; and whether the deceased, as a matter of law, assumed the risk of the hazards of the fire.

When we examine the brief of the plaintiff, we find that she argues only the application of the so-called "rescue doctrine," seemingly as a palliative for all the errors the defendant claims to exist in the judgment under review. But when we turn to the record, we find that, although the plaintiff offered an instruction which would have submitted the issue of the rescue doctrine to the jury, the instruction was refused. The plaintiff neither excepted to such refusal nor assigned cross-error thereto. In any event, the holding about to be made renders inappropriate any application of the rescue doctrine.

In our view, the crucial determination to be made is whether the defendant is correct in its contention that the

deceased, as a matter of law, assumed the risk of the hazards of the fire in which he received his fatal injuries.

It is difficult to tell what the plaintiff's position is with regard to the issue of assumption of risk; but apparently it is that because the deceased was summoned by a fire warden under the authority of Code, § 10-59, rather than going voluntarily, to fight the fire, it cannot be said, as a matter of law, that the deceased assumed any risk.

Code, § 10-59 provides, in its pertinent parts, as follows:

> "Any forest warden to whom written instructions have been issued by the State Forester authorizing him to employ persons to assist in suppressing forest fires, shall have the authority to summon as many able-bodied male persons between eighteen and fifty years of age as may, in his discretion, be reasonably necessary to assist in extinguishing any forest fire which may burn in any county or city of this State which is organized for forest fire control under the direction of the State Forester. Any person so summoned by a forest warden to fight a forest fire shall be paid for such services at such rate of pay as is provided for in the State forest service wage scale for fire fighting in effect in the county or city, or part thereof, in which the fire is fought . . .
>
> "Any person so summoned who shall fail or refuse to assist in fighting such fire, unless such failure is due to physical inability or other good and valid reason, shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than twenty-five dollars."

Code, § 10-59 must be read in conjunction with Code, § 10-57 which provides, in part, as follows:

> "When any forest warden sees or there is reported to him a forest fire, he shall repair immediately to the scene of the fire and employ such persons and means as in his judgment are expedient, and necessary to extinguish the fire, within the limits of the expense he had been authorized to incur in his instructions from the State Forester . . ."

The legislature, therefore, by the enactment of Code, § 10-57, has conferred upon forest wardens the authority to *employ* persons to assist in extinguishing forest fires, obviously contemplating a situation where the necessary assistance can be obtained without resort to compulsion. But where the needed assistance cannot be so freely secured, the legislature, by Code, § 10-59, has conferred upon forest wardens the authority to *summon* persons to help in fighting fires, placing those so summoned under pain of prosecution for their failure or refusal to give aid.

Unfortunate though it may be for the plaintiff's position, the record simply does not support the proposition that the deceased assisted in fighting the fire in question because he was summoned under Code, § 10-59 to do so but, rather, because of a prior voluntary arrangement with the forest warden.

In the first place, the plaintiff's motion for judgment alleged that the deceased attempted to extinguish the fire "in response to request from Forest Warden." Neither the word "summoned" nor Code, § 10-59 was mentioned in the motion for judgment.

Secondly, the uncontradicted evidence was that the deceased went to the scene of the fire, not under compulsion of a summons pursuant to Code, § 10-59, but as the result of a previous understanding with Brightwell, the forest warden. Brightwell, testifying as a witness for the plaintiff, was asked, with respect to his calling the deceased to "come and help" fight the fire in question, "How did you happen to call him?" Brightwell responded, "Well, he told me he would go with me to a fire anytime and he had been with me to several fires before that."

Brightwell explained that "all Fire Wardens are supposed to have some men that they can pick up most anytime to go." He stated that the deceased was "one of those . . . anytime he could go he would go."

At another point, Brightwell was asked whether the deceased "was going in voluntarily" to fight the fire in

question. The warden replied, "That is right." Brightwell also testified that the wage for fighting forest fires was fifty cents an hour and that the deceased knew he was going to be paid. And the warden stated that if the deceased had expressed a desire not to fight the fire, he would not have required him to do so.

Thus, it was conclusively shown that the deceased, knowing that he was to be paid for his work, responded to the "call" to fight the fire because of his pre-existing arrangement with the forest warden that "he would go . . . anytime he could go," an arrangement free of the punitive compulsion of Code, § 10-59.

We need not decide what would be the status of a person injured while fighting a forest fire under compulsion of the summons of a fire warden pursuant to Code, § 10-59. It is clear that the deceased did not occupy such a position. It is equally clear that under the circumstances of this case, the status of the deceased with respect to the fire in question was that of a paid fireman.

This court has not had occasion previously to decide whether one who through negligence starts a fire is liable, solely because of such negligence, for injuries sustained by a fireman while attempting to suppress the fire. From an examination of the authorities, however, we find that the general, and all but unanimous, rule is that there is no such liability. See 35 Am. Jur. 2d, § 45, p. 624; 65 C. J. S., Negligence, § 63 (110), p. 861; 74 C. J. S., Railroads, § 496, p. 1087, at 1092; Annotation, 86 A. L. R. 2d 1205, at 1213; and the cases cited in each.

Our research discloses that liability has been imposed in some instances for negligence creating undue risks of injury, such as hidden, unknown, and increased dangers, the hazard of which a fireman does not ordinarily assume. Where liability was found, the emphasis was said to be not upon culpability with respect to the inception of the fire, but rather upon fault in creating undue risks of injury, that is, risks beyond those inevitably involved in fire fighting. See

discussion in *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129, 131 (1960). Or, as differently expressed in another case:

> " . . . The law on this subject is not concerned with how the fire began or spread before the firemen arrived, but rather whether, after they arrived and undertook to fight the fire, they were subjected to risks not inevitable or inherent in fighting the fire of that kind and extent. . . . " *Jackson v. Velveray Corp.*, 82 N. J. Super. 469, 198 A.2d 115, 121 (1964).

We have found only one case where liability was imposed for the negligence itself involved in the starting of a fire. That is the case of *Houston Belt & Terminal Ry. Co. v. O'Leary*, 136 S.W. 601 (Tex. Civ. App. 1911). Although the case may be distinguished from those falling within the general rule of non-liability because it concerned the negligent handling of fireworks, it has, nonetheless, received some criticism. See *Suttie v. Sun Oil Co.*, 15 Pa. Dist. & Co. R. 3, 7 (Cty. Ct. 1930) and Bohlen, "The Duty of a Landowner Toward Those Entering His Premises of Their Own Right." 69 U. Pa. L. Rev. 237, 252, fn. 39 (1920-21).

Some of the courts have placed their finding of non-liability upon the basis that the defendant owed no duty to exercise care to avoid creating a situation where the special services of a fireman would be required. The rationale of this view is that while one owes a duty to the public in general to refrain from negligently starting a fire, he owes no private duty to the fireman whose business it is to deal with the hazards of fire, whether or not negligently set, any such negligence being immaterial. Typical of the cases expressing this view is *Krauth v. Geller, supra.*

Another basis for the rule of non-liability is that a fireman assumes the usual risks inherently involved in fire fighting. The rationale of this view may be expressed as follows: The fireman, from the very nature of the public duty undertaken by him, is bound to aid in suppressing fires, however caused. It is well known that there is negligence present in the origin of many, if not most, fires and that there are potential dangers inherent in all. In respond-

ing to an alarm, the fireman necessarily is aware that fire is in progress and that the usual hazards are apt to exist; yet his duty so to respond is unaffected by the fact that the fire may have been created by negligence. If injured while encountering the ordinary hazards his duty requires him to confront, it is immaterial that the fire was negligently set. Typical of the cases expressing such a view is *Wax v. Co-operative Refinery Ass'n*, 154 Neb. 805, 49 N.W. 2d 707 (1951). See also *Bartels v. Continental Oil Company*, 384 S.W. 2d 667, 669 (Mo. 1964), *Buren v. Midwest Industries, Inc.*, 380 S.W. 2d 96, 99 (Ky. 1964); *Krauth v. Geller, supra*, 31 N.J. 270, 157 A.2d 129, 130-131 (1960); *Shypulski v. Waldorf Paper Products Co.*, 232 Minn. 394, 45 N.W. 2d 549, 551 (1951); *Pentress v. Co-operative Refinery Ass'n*, 149 Neb. 355, 31 N.W. 2d 225, 227-228 (1948); *Campbell v. Pure Oil Co.*, 15 N.J. Misc. 723, 194 A. 873, 875-876 (1937); *Buckeye Cotton Oil Co. v. Campagna*, 146 Tenn. 389, 242 S.W. 646, 647 (1922); *Clark v. Boston & M. R. R.*, 78 N.H. 428, 101 A. 795, 797 (1917); and *Lunt v. Post Printing & Publishing Co.*, 48 Colo. 316, 110 P. 203, 208 (1910).

The assumption of risk doctrine employed in fire cases does not depend upon the existence of a spirit of venturesomeness in the face of known danger, as is true in automobile negligence cases, but rather upon the relationship between the fireman and the public, from which arises his obligation to accept the usual risks of injury in undertaking to suppress fires without regard to whether or not they are caused by negligence.

As has been noted, the rule of non-liability is in some jurisdictions based upon a finding that one owes a fireman no duty of care to refrain from negligently starting fire. That finding emerged from a struggle by the courts to affix some label, such as trespasser, licensee, or invitee, to the status of a fireman with respect to premises where called to fight fire—a struggle quite unnecessary, it seems to us, since the fireman, because of the public nature of his rights and duties, is in a class of his own.

Even so, we perceive no persuasive reason not to follow the almost unbroken line of decisions holding non-liability to firemen for negligence in the creation of fire. We are of opinion, however, that the more logical basis upon which to place such a holding is assumption of risk. We find the logic of that position expressed in *Wax v. Co-operative Refinery Ass'n, supra,* 154 Neb. 805, 49 N.W. 2d 707, 710 (1951), where, quoting from the case of *Suttie v. Sun Oil Co., supra,* 15 Pa. Dist. & Co. R. 3 (1930), it was stated:

> "'It is a well known fact that in the great majority of instances fires originate from the negligence of those in possession of property. To impose upon an owner liability for such negligence in favor of those who voluntarily assume all the dangers growing out of so hazardous an occupation, however commendably courageous and disinterested the assumption may be, would inflict an onerous and unfair risk upon one who is deprived of all control over the other's acts, who cannot even prevent him from assuming such risks, who, for the public good, has temporarily lost all control over his property, and who is helpless to protect himself. . . .'"

The record before us shows that it is not unusual for wind to rise and cause a forest fire to "mushroom up or explode," as occurred in this case, and that any experienced fire fighter would be aware of the likelihood of such happening. The record further discloses that the deceased was an experienced fire fighter and that he "knew of the hazard of fighting fire."

There are no circumstances here to suggest that any negligent act of the defendant caused the deceased to be subjected to risks of injury beyond those inherently involved in fire fighting. We are not warranted, therefore, in applying to the situation at hand the undue-risk exception to the general rule of non-liability. Since none but the usual hazards were involved in fighting the fire in question, we hold, as a matter of law, that the deceased assumed the risk thereof.

The judgment of the trial court will be reversed, the verdict of the jury set aside, and final judgment entered here in favor of the defendant.

Reversed and final judgment.

APPENDIX B

IN THE
SUPREME COURT OF APPEALS
OF VIRGINIA
AT RICHMOND

RECORD NO. 6541

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Appellant,

v.

JEWEL RAMSEY CROUCH, ADMINISTRATRIX OF THE ESTATE OF MALCOLM LEE CROUCH, DECEASED,
Appellee.

PETITION FOR REHEARING

* * *

II.

GROUNDS FOR REHEARING

The several premises upon which the decision of the Court is founded are deserving of further consideration for reasons herein shown. Further, as will also be shown, the practical result of the decision is to deprive the decedent of the equal protection of the law and of property without

due process of law. Then too, there is the matter of public policy incident to permitting the defendant, The Chesapeake and Ohio Railway Company, to escape the proximate result of its wilful infraction of the statute requiring it to keep its right of way free and clear of combustibles. Finally the decision signifies a drastic change in Virginia law.

* * *

[Appearing in Record 206, 207]

APPENDIX C

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 22nd day of April, 1968.

Chesapeake and Ohio Railway Company,
Plaintiff in error,

against Record No. 6541

Jewel Ramsey Crouch; Administratrix, etc.,
Defendant in error.

Upon a Petition to Rehear

On mature consideration of the petition of the defendant in error to set aside the judgment rendered herein on the 4th day of March, 1968, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ (Illegible)

Clerk

Office-Supreme Court, U.S.
FILED
AUG 19 1968

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 312.

JEWEL RAMSEY CROUCH, ADMINISTRATRIX OF THE ESTATE OF MALCOLM LEE CROUCH, DECEASED,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
I OBJECTIONS TO THE JURISDICTION	2
II CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
III QUESTION PRESENTED FOR REVIEW	6
IV STATEMENT OF THE CASE	7
V ARGUMENT	8
VI CONCLUSION	11

CITATIONS OF AUTHORITY

Cases:

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 50 S. Ct. 451(1930). . 3,4

Durley v. Mayo, 351 U.S. 277, 76 S. Ct. 806 (1956) 3

Fairport Co. v. Meredith, 292 U.S. 589, 54 S. Ct. 826 (1934) . . .3,10

Levy v. Louisiana, 20 L. Ed. 2d 436, 36 U.S. Law Week 4458 (No. 508, October term 1967, decided May 20, 1968). . . . 10

Sage Stores Co. v. Kansas, 323 U.S. 32, 65 S. Ct. 9 (1944) 4

United States v. Burnison, 339 U.S. 87, 70 S. Ct. 503 (1950) . . . 4

Statutes:

28 U.S.C. 1257 (3) 2,4,5
Code of Virginia, 1950, Section 10-57 5,7
Code of Virginia, 1950, Section 56-426 5,6,8
Code of Virginia, 1950, Section 56-428 6,7
Virginia Acts of Assembly, 1966, Chapter 524. 6,8,9

In The

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No. 312.

JEWEL RAMSEY CROUCH, ADMINISTRATRIX OF THE ESTATE OF MALCOLM LEE CROUCH, DECEASED,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Jewel Ramsey Crouch, Administratrix of the Estate of Malcolm Lee Crouch, deceased, will be referred to as the petitioner; The Chesapeake and Ohio Railway Company as respondent; or these parties may sometimes be referred to as plaintiff and defendant, respectively, the position occupied by them in the trial of the case in the Circuit Court of Amherst County. The Supreme Court of Appeals of Virginia will sometimes be referred to as the Appellate Court,

the Circuit Court of Amherst County as the Trial Court, and the Supreme Court of the United States as the Supreme Court.

The respondent prays that the Petition for Certiorari be denied.

I.

OBJECTIONS TO THE JURISDICTION

Petitioner agrees that the jurisdiction of this Court is controlled by 28 U. S. C. 1257(3), the text of which appears, *infra*, at page 4.

Respondent does not contend that the fact that petitioner first sought to raise a federal question in this proceeding at the time of filing her Petition for Rehearing in the Appellate Court would defeat this Court's jurisdiction. Respondent does contend that no federal question has ever existed in the case and that the action of the Appellate Court in declaring as a matter of law that petitioner's decedent had assumed the risk of the hazard that resulted in his fatal injury did not raise a federal question.

The petitioner does not question the validity or constitutionality of any of the state statutes involved, nor has petitioner shown the existence of "any title, right, privilege or immunity . . . set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."[1]

In order for this Court to exercise its power of review over a decision of the highest court of the state, there

[1] 28 U. S. C. 1257(3).

must be a federal question involved in the decision of the state court. See *Durley* v. *Mayo*, 351 U. S. 277, 281, 76 S. Ct. 806 (1956).

The essence of petitioner's contention is that the decision of the Appellate Court was "at odds with the law of other jurisdictions which have examined the specific question involving 'volunteer' firemen" (Petition p. 10). That contention does not create a federal question. See *Fairport Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826 (1934).

Petitioner cites *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451 (1930), as authority for the proposition that the constitutional issue would have been timely raised in her Petition for Rehearing if there had been such an issue. With that we agree, but *Brinkerhoff* does not support the contention that a federal question actually exists in the present litigation. In *Brinkerhoff*, the highest court of the State of Missouri denied relief because the petitioner had failed to avail itself of an administrative procedure which the state court had previously ruled to be unavailable. This Court properly declared that the action of the Missouri court resulted in a denial of procedural due process. In fact, *Brinkerhoff* supports a determination that this Court lacks jurisdiction in this case:

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous deci-

sions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court." (*Brinkerhoff-Faris Co.* v. *Hill, supra,* at p. 680)

See also *United States* v. *Burnison,* 339 U. S. 87, 70 S. Ct. 503 (1950), and *Sage Stores Co.* v. *Kansas,* 323 U. S. 32, 65 S. Ct. 9 (1944).

II

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the state statutes and federal constitutional provision set forth in the Petition for Writ of Certiorari under this heading, the following statutes are involved:

1. 28 U. S. C. 1257 (3):

"§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) * * *

(2) * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution,

treaties or statutes of, or commission held or authority exercised under, the United States."

2. Code of Virginia, 1950, Section 10-57, which provides as follows:

"**§ 10-57. Duty in case of fires and payment of costs of suppression.**—When any forest warden sees or there is reported to him a forest fire, he shall repair immediately to the scene of the fire and employ such persons and means as in his judgment are expedient and necessary to extinguish the fire, within the limits of the expense he has been authorized to incur in his instructions from the State Forester. He shall keep an itemized account of all expenses thus incurred and immediately send the account verified by affidavit to the State Forester for examination.

"Upon approval by the State Forester the account shall be paid from the fund provided for protection of forests in the several counties or cities, as appropriated for such purpose. Any person having a claim for compensation hereunder may avail himself of the ordinary process of law in a proceeding in the county or city in which the services were rendered against the Commonwealth, in which the Director shall be made a party.

"No such payment shall be made to any person who has maliciously started the fire or to any person whose negligence caused or contributed to the setting of the fire."

3. Code of Virginia, 1950, Section 56-426, which reads as follows:

> "§ 56-426. **Manner in which right of way shall be kept.**—Every railroad company shall keep its right of way clear and free from weeds, grass, and decayed timber, which from their nature and condition are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property."

4. Code of Virginia, 1950, Section 56-428, which reads as follows:

> "§ 56-428. **Railroads liable for damage from fires set out by their engines or trains.**—Whenever any persons shall sustain damage from fire occasioned by sparks or coals dropped or thrown from the engine or train of any railroad company, such company shall be liable for the damage so sustained, whether such fire shall have originated on the company's right of way or not, and whether or not such engine is equipped with proper spark-arresting appliances, and regardless of the condition in which such appliances may be."

5. Virginia Acts of Assembly, 1966, Chapter 524, the text of which is set forth as Appendix A, *infra*.

III

QUESTION PRESENTED FOR REVIEW

The question here presented for review is nothing more than—does a state court deny a claimant due process and equal protection of the laws when it decides as a matter of law, solely on issues and principles of state law, as applied to the evidence in this case, that the status of the decedent was that of a paid fireman who assumed the risk of the

hazard that resulted in his death? In essence, petitioner is requesting this Court to substitute its judgment for that of the state Appellate Court as to the sufficiency of evidence in a wrongful death action governed solely by issues and principles of state law, in which no valid contention could be made that procedural due process was denied.

IV

STATEMENT OF THE CASE

The factual posture of this case is distorted at the outset by petitioner's inaccurate statement that her decedent was burned to death while fighting a fire "to which he had been summoned under the threat of criminal sanctions for failing to respond" (Petition p. 3). The evidence does not support that contention and the Appellate Court so found (Petitioner's Appendix A, p. 12). Petitioner's reference to R. 78 (Petition, footnote 5, p. 6) merely indicates that the forest warden in charge of the fire fighting in question had the statutory authority to summon fire fighters, an authority clearly recognized by the Appellate Court (Petition p. 15). The mere existence of such authority does not establish that it was utilized in obtaining the services of petitioner's decedent. On the contrary, the evidence establishes conclusively that the decedent was a paid volunteer fireman employed by the forest warden pursuant to the provisions of Virginia Code Section 10-57 (*supra*, p. 5). The Appellate Court so found as a matter of law.

Petitioner relies on Virginia Code Section 56-428 (*supra*, p. 6), contending that the jury finding that the fatal fire was started by the respondent makes respondent liable to petitioner as a matter of law (Petition p. 7, foot-

note 6, and p. 10). This theory was advanced to the Trial Court in the form of plaintiff's instruction No. 2 and was rejected by the Trial Court without exception (R. p. 126).

Respondent did concede in the Appellate Court that the jury verdict precluded it from contending that it was not guilty of negligence in failing to keep its right of way clear of combustible material as required by Virginia Code Section 56-426 (supra, p. 6). Neither the jury's finding of fact relating thereto, nor respondent's concession of its inability to deny negligence after verdict, nor respondent's failure to admit negligence in the Trial Court raises a federal question.

The Court should be advised of the following specific facts, to which petitioner makes no reference. The petitioner received workmen's compensation benefits in addition to Social Security benefits as a result of the decedent's death. The Virginia Legislature made a $20,000 special appropriation for the benefit of the decedent's widow and her three infant children. *Virginia Acts of Assembly*, 1966, Chapter 524 (Appendix A herewith, p. 1a). These facts conclusively establish that petitioner's decedent was employed as a paid volunteer and that he was not summoned under the threat of criminal sanctions for failing to respond.

V

ARGUMENT

Petitioner claims that the decision below precluded her and her children from obtaining workmen's compensation benefits and that she received none (Petition p. 9). That

is contrary to fact. Chapter 524, *Virginia Acts of Assembly*, 1966 (*infra*, Appendix A), recites the fact that such benefits were paid—a recitation not contradicted anywhere in the record.

Petitioner contends that the "rescue doctrine" would have sustained her jury verdict had her decedent not been treated as a professional fireman (Petition p. 9). Application of the "rescue doctrine" as a refutation of a showing of contributory negligence is a matter of state law—varying greatly in its application in the various jurisdictions. The record, page 127 (plaintiff's instruction No. 8), shows that the petitioner took no exception to the Trial Court's refusal to give an instruction offered by the petitioner which would have submitted to the jury the issue of "rescue," nor does petitioner explain how the application of that doctrine could have saved her verdict when it was totally irrelevant to the decision of the Appellate Court. That decision was that there was no jury question because there was no conflict in the evidence—a decision which raises no federal question.

The petitioner also assigns as a reason for granting the writ that:

> "The opinion below has so far departed from the accepted and usual course of judicial proceedings, that this court ought to exercise supervision. * * *"
>
> (Petition p. 9)

That language apparently was taken from Rule 19 (b), 28 U. S. C., Revised Rules of the Supreme Court, and pertains only to appeals from United States Courts of Appeals and is inapplicable in this case.

Petitioner complains that assumption of risk in this case should be left to jury determination, implying that the evidence was in conflict. The Appellate Court found as a matter of law that the petitioner's decedent was a paid volunteer fireman and, therefore, assumed the risk of the hazard that resulted in his death. That decision raises no federal question.

Petitioner argues also (Petition p. 10) that under the laws of some other jurisdictions, her decedent would be treated as an invitee. The Appellate Court decided otherwise and found that under Virginia law, fully supported by the law of other jurisdictions (Petition pp. 18-19), as applied to the controlling facts of this case, petitioner's decedent was a paid volunteer fireman and not an invitee. That decision raises no federal question. *Fairport Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826 (1934), Supra.

Petitioner demonstrates the fallacy of her contentions by final reliance on *Levy* v. *Louisiana*, 20 L. Ed. 2d 436, 36 U. S. Law Week 4458 (No. 508, October term 1967, decided May 20, 1968). The question presented in *Levy* was whether a state statute was constitutional when interpreted to allow wrongful death benefits only to legitimate children. That case merely decided that there was no rational basis for interpreting Louisiana's survival statute so as to exclude illegitimate children as a class, whose loss is no less because of being bastards and whose legal status is unrelated to the nature of the wrong inflicted on their parent. The case at bar involves no such federal question. Petitioner's decedent is declared to be a paid volunteer fireman subject to the assumption of risk doctrine like any other paid volunteer because the uncontradicted evidence supports no other conclusion.

VI

CONCLUSION

Respondent respectfully submits that the writ should be denied because there is no federal question to be decided by this Court.

Respectfully submitted,

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APPENDIX A

Virginia Acts of Assembly, 1966,

Chapter 524

Whereas, Malcolm L. Crouch of Madison Heights, Amherst County, Virginia, age thirty-five, the husband of Loretta Jewell Ramsey Crouch, father of three small children, and a foreman at the Glamorgan Pipe and Foundry Company, Lynchburg, did on April eighteen, nineteen hundred sixty-four, report to Forest Fire Warden John P. McFaden at a forest fire near Joshua Falls in Amherst County and, following instructions from Forest Fire Warden McFaden, assisted in constructing a forest fire control line; and

Whereas, due to a sudden shift in wind direction in rough, rugged mountain terrain, a wall of head fire bore down on the fire crew while working to control the fire, making it necessary for them to run for their lives; and

Whereas, Malcolm L. Crouch was caught in the flames, causing second and third degree burns on most of his body which critically injured him and confined him to the Lynchburg General Hospital, where despite the best of medical attention, he died on June four, nineteen hundred sixty-four; and

Whereas, the untimely death of husband and father has left the widow and three small children dependent upon twelve dollars per week over three hundred weeks from Workmen's Compensation Insurance, and Social Security; now, therefore

Be it enacted by the General Assembly of Virginia:
1. § 1. There is hereby appropriated from the general fund of the State treasury the sum of twenty thousand dollars to be paid by check issued by the State Treasurer on a warrant of the Comptroller as provided by law, payable to the First and Merchants National Bank of Lynchburg, Virginia, for the purpose of establishing a trust fund from which a payment of two hundred dollars shall be made monthly, so long as trust funds are available to Loretta Jewell Ramsey Crouch, widow of Malcolm L. Crouch, for the joint and equal use of herself and the infant dependents, Gary Lee Crouch born April six, nineteen hundred fifty-two, Mark Arnold Crouch born December twenty-seven, nineteen hundred fifty-four and Malcolm Vincent Crouch born May twenty-two, nineteen hundred sixty, unless, in the opinion of the Trust Officer of the First and Merchants National Bank of Lynchburg, Virginia, changed conditions require a modification of the monthly payment in order to fulfill the intent of this appropriation, in which circumstance authorization is herein and hereby granted to the aforesaid Trust Officer to put into effect such modification of monthly payment as, in his opinion, is necessary, fair and just.

The State Treasurer is directed to issue such check only upon execution by Loretta Jewell Ramsey Crouch, on behalf of herself and her minor children, of a release of all claims they may have against the Commonwealth or any employee thereof in connection with the death of Malcolm L. Crouch.